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JUL 28 1958
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 228

JOHN McSHAIN, INC., *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit made and entered in the above case on May 8, 1958 (Order denying a Petition for Rehearing entered June 10, 1958).

OPINIONS BELOW

The Opinion of the United States District Court for the District of Columbia (R. 38a-39a) is not reported. It is appended to this petition in the Appendix at pages 1a-2a. The Opinion of the Court of Appeals for the District of Columbia (R. 90-92) is not yet reported. It is appended to this petition in the Appendix at pages 3a-7a.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was made and entered on May 8, 1958 (R. 93), and the Order denying a rehearing was entered June 10, 1958 (R. 120). A copy of said judgment of May 8, 1958, is appended to this petition in the Appendix at page 8a. Jurisdiction of this Court is invoked under 28 USC 1254(1).

QUESTIONS PRESENTED

The Armed Services Procurement Act of 1947 provided that contracts for the armed services should be made by advertising, except that contracts "may be negotiated by the agency head without advertising" if one of seventeen listed conditions existed. The word "negotiated" was not defined in the Act. A regulation of the Corps of Engineers defined "negotiation" as "The procurement of supplies or services in the open market in a manner common among businessmen without securing formal advertising." A regulation of the Department of Defense stated "Negotiation means that method of procurement under which the procedures for procurement by formal advertising are not required."

Respondent sent to petitioner and other contractors written Requests for Proposals and written Contractor's Proposals. The Request for Proposals stated that proposals would be received "for the purpose of negotiating a construction contract." The Contractor's Proposal stated that the undersigned contractor "In compliance with your Request for Proposals" proposed to do the job in accordance with the drawings and specifications for a stated price. Petitioner and other contractors filled in various terms and prices in the

Contractor's Proposals and sent them to respondent. Respondent, without further communicating with petitioner, issued a third document known as a Notice of Award and Notice to Proceed, which stated that petitioner's proposal was accepted and petitioner should proceed with the work. Petitioner disputed that the interchange of the documents mentioned created a contract, and did not proceed with the work. The Secretary of the Army referred the dispute and the documents to the Comptroller General, who decided that no contract had been made and that petitioner had incurred no liability by its proposal. Thereafter, respondent brought suit against petitioner in the District Court for damages for breach of contract, and the District Court decided that the interchange of the documents did not make a contract. The Court of Appeals reversed. The questions presented are:

1. Whether petitioner's submission of its proposal to respondent, and respondent's consideration and acceptance of that proposal, constituted "negotiating a construction contract" within the meaning of the statement in respondent's Request for Proposals that proposals would be received "for the purpose of negotiating a construction contract".

2. Whether petitioner's proposal was an offer and respondent's Notice of Award and Notice to Proceed was an acceptance, making a contract.

3. Assuming that the Comptroller General's decision was wrong, but that Government paying officers would not have paid petitioner for work done on the basis of a contract established by the documents which the Comptroller General decided did not make a contract: Whether respondent is entitled to damages because petitioner did not proceed with the work.

STATUTES AND REGULATIONS

Appended to this petition at pages 9a to 14a of the Appendix, are pertinent portions of statutes and regulations as follows: The Armed Services Procurement Act of 1947, (41 U.S.C.A. Secs. 151 *et seq.*; Act of February 19, 1948, c. 65, Sec. 2, 62 Stat. 21), which was the statute in effect when the transaction involved in this case occurred, page 9a; The Act of August 10, 1956, (Title 10, U.S.C., Chapter 137, Secs. 2301 *et seq.*) amending and recodifying the original Act, pages 9a-10a; also The Act of June 10, 1921 (31 U.S.C.A.. Secs. 71, 74) (Budget and Accounting Act of 1921, as amended) relating to references of accounts to the Comptroller General and the effect of his findings, pages 10a-11a; also Orders and Regulations of the Engineers Corps, Department of the Army, Part I, Chapter VII, Sec. 7102.01 and Sec. 7102.02(b)(1), defining "negotiation", pages 11a-12a; and Armed Services Procurement Regulations (ASPR) 3-101, Code of Federal Regulations (CFR), Title 32, Chapter IV, Sec. 402.101, page 12a, defining "negotiation" and outlining procedure in negotiated procurement, and Army Procurement Procedures (APP) 3-101, C.F.R., Title 32, Chapter V, Sec. 592.101, relating to procedure in negotiated procurement, pages 12a-14a.

STATEMENT

Respondent filed a complaint in the United States District Court for the District of Columbia claiming damages from petitioner for breach of contract in failing to construct an underground Pentagon at Fort Ritchie, Maryland. Jurisdiction was invoked under 28 USC 1345. (R. 2a-3a). At the trial the respondent elected to rely for proof of the contract on three

documents prepared by respondent and exchanged between the parties, as follows:

1. A Request for Proposals (R. 4a-14a) which respondent sent to petitioner and other contractors. This Request stated that proposals would be received "for the purpose of negotiating a construction contract" for the work and provided "The right is reserved as the interest of the Government may require to reject any and all proposals and to negotiate with any proposer." (R. 4a).

2. A Contractor's Proposal (R. 14a-18a) sent by respondent to petitioner and other contractors and executed and returned by them to respondent. The Proposal stated "In compliance with your Request for Proposals * * * the undersigned hereby proposes * * * to * * * perform all work * * * in strict accordance with the specifications * * * (R. 14a) and agrees upon receipt of written notice of an award of the contract * * * that he will execute contract Form No. R-5701 in accordance with the proposal as accepted * * *" (R. 17a).

3. A Notice of Award and Notice to Proceed [a single document] (R. 18a-19a), which respondent sent to petitioner without consulting or communicating with petitioner after receipt of petitioner's Proposal. This notice stated that petitioner's proposal had been accepted and that petitioner should proceed with the work.

Respondent rested its case on the above three documents, and Judge Letts entered judgment for petitioner. The Court found that respondent initiated negotiation proceedings with petitioner and that the transaction never got beyond the negotiation stage, and that when petitioner submitted its proposal it did not intend that it should be treated as a firm bid. The

Court concluded that respondent had failed to make out a prima facie case because the documents failed to show a binding and enforceable contract. (R. 38a-39a, Appendix to this petition, pages 1a-2a).

On appeal the Court of Appeals reversed, holding that the exchange of these documents made out a prima facie case and that petitioner should have been put to its proof. (Opinion of Court of Appeals, R. 90-92, Appendix to this petition, pages 3a-7a).

The Court ruled that respondent's Request for a Proposal to negotiate a construction contract was an invitation to make an offer; and that petitioner's submission of a Proposal in compliance with that Request in and of itself constituted petitioner's part of the negotiation, which the respondent could accept without any further act.

The Court commented that when petitioner submitted its proposal it could not conceivably have desired that respondent should reject it, and should expect that any further negotiations could mean only that the Government would try to get even better terms.

REASONS FOR GRANTING WRIT

The decision below should be reviewed because the Circuit Court of Appeals has decided what petitioner and respondent agree is an important question of federal law affecting a substantial portion of all Government procurement which has not been but should be settled by this Court.

The respondent in its brief in the Court of Appeals stated at page 7:

> "This would appear to be the first time a court has been presented with a question as to the meaning of the word 'negotiation' in the Armed Services Procurement Act of 1947. The significance

> of this issue to armed forces procurement can hardly be overestimated. Its importance is perhaps underscored by the fact that over two-thirds of armed service contracts are procured by 'negotiation' within the meaning of that statute rather than by the statutory alternative of formal advertising."

The decision erroneously reads into the Armed Services Procurement Act of 1947 and its present recodified amendment, a definition of the word "negotiation" which permits the government to impose a contract on a contractor by soliciting proposals from contractors on the representation that they will be received for the purpose of negotiating a contract and then accepting one of the proposals without giving the proposer an opportunity to discuss the final terms of such contract. The decision rejects the idea of mutuality in negotiated procurement between the government and contractors.

It would permit the government to distort the method of procurement covered by advertising for final bids, by achieving the same result without putting potential proposers on notice of its intention to treat their proposals, requested for the stated purpose of negotiating a contract, as an advertised, final bid. There would be no need for both methods of procurement as permitted in the Act unless the word "negotiate" is given its regular, accepted meaning.

The logical result of this decision will be the elimination of negotiated procurement.

1. The decision below should be reviewed because it is in conflict with decisions of this Court holding that words used in a statute have the meaning understood by Congress when it enacted the legislation and are presumed to have been intended in their ordinary sense.

Addison v. *Holly Hill Fruit Products*, 322 U.S. 607, 618, 88 L. ed. 1488, 1496 (1944); *United States* v. *Stewart*, 311 U.S. 60, 63, 69, 85 L. ed. 40, 45, 48 (1940).

The Armed Services Procurement Act of 1947 was the statute in effect in the instant case. It provided that all purchases and contracts for supplies and services should be made by advertising except that contracts "may be negotiated by the agency head without advertising" if one of 17 listed conditions existed (Appendix to this Petition, page 9a). The word "negotiated" was not defined in the statute. Title 10, USC, Chapter 137, Secs. 2301-2314, (approved by Congress August 10, 1956) is a codification of the Armed Services Procurement Act of 1947. This codification, however, does not change the substance of the Armed Services Procurement Act of 1947 referred to above. In Sec. 2302 entitled "Definitions", it adds a new provision which states "'negotiate' means make without formal advertising." (Appendix to this petition page 9a) It is submitted that this adds no light as to a definition of the word "negotiate". Thus the Court of Appeals decision affects current procurement as well as procurement involved in the instant case.

The meaning of "negotiation" adopted in the decision below is contrary to its meaning in the dictionary, in the statute and in the regulations.

The dictionary meaning of negotiation is "the deliberation, discussion or conference upon the terms of a proposed agreement; the act of settling or arranging the terms or conditions of a bargain, sale, or other business transaction." (Black's Dictionary, 3rd ed.) In Webster's Collegiate Dictionary, 2nd ed. (1953) negotiation is defined as "To hold intercourse with a view to coming to terms; to confer regarding a basis of agreement".

The decision below, however, defined negotiation as "a process of submission and consideration of offers until an acceptable offer is made, and accepted, or until it becomes apparent that no acceptable offer will be made." (Appendix to this petition, page 6a)

The Court of Appeals in its opinion does not purport to state a technical or special meaning of the word "negotiating". Respondent did not in that Court nor in the District Court seek by judicial notice or evidence to establish a special meaning. Respondent in its Request for Proposals represented that "Proposals will be received * * * for the purpose of negotiating * * * ", meaning that negotiating would occur after respondent received petitioner's proposal. All that occurred after respondent received petitioner's proposal was that respondent unilaterally considered it and accepted it. The effect of the Court's interpretation of the word "negotiation" is to transform the language in the Request for Proposals to mean substantially as follows:

> "Proposals will be received for the purpose of being considered and if one of them is acceptable, accepting it as a final construction contract".

The Request for Proposals is the only document in the case which indicates the purpose for which the Contractor's Proposals were to be received by respondent. This statement of purpose is basic to the whole transaction, as it shows the condition under which petitioner's proposal was delivered to respondent. This statement of purpose cannot be qualified by reference to interior provisions within the proposal itself, such as the provision quoted in the opinion below that petitioner "agrees, upon receipt of written notice of an award * * * that he will execute contract Form No.

R-5701 in accordance with the proposal as accepted." (Appendix to this petition, page 6a). *Cf. Peugh* v. *Davis*, 96 U.S. 332, 24 L. ed. 775 (1877); *Burke* v. *Dulaney*, 153 U.S. 228, 38 L. ed. 698 (1893).

The statement in the Request for Proposals that "* * * the right is reserved as the interest of the Government may require to reject any and all proposals and to negotiate with any proposer" (R. 4a) does not qualify the promise implicit in the first sentence of the Request to negotiate with the petitioner before *accepting* petitioner's proposal.

The Court's decision can only mean that "negotiation" confers on the government a one-sided right to insist upon more favorable terms for its own advantage with no corresponding right in a contractor to discuss better terms for itself, or contingencies not provided for in the proposal, or conditions that might arise after submission of a proposal, or the countless other things that are discussed among businessmen in transactions of this kind.

Admittedly, statutory provisions covering procurement are intended for the protection of the Government. But it is submitted that this does not permit the Government to represent it is using one method of procurement when its real intention is to use another.

2. The applicable regulations both defined and used the word "negotiation" in its ordinary sense.

O&R 7102.02(b)(1) (Orders and Regulations, Corps of Engineers, Department of the Army) defined "negotiation" as:

> "The procurement of supplies or services in the open market in a manner common among businessmen without securing formal competition * * *" (Appendix to this Petition, page 11a).

Army Procurement Procedures (APP 3-101) provided:

> "Conduct of negotiations. Procurement by negotiation is less automatic than and does not have the rigid limitations of formal advertising, bid and award procedures;"
>
> * * * * * *
>
> "After receipt of the initial proposals, separate negotiations may be conducted with any source of supply submitting an offer. The contract should be placed with the supplier making the best final proposal and who has the requisite ability to perform."
>
> * * * * * *
>
> "During negotiations potential suppliers must be informed of the provisions which will appear in the contract to be executed:" (Appendix to this Petition, pages 13a-14a).

Armed Services Procurement Regulations, Sec. 3-101, under the subtitle "Negotiations as Distinguished from Formal Advertising" provides:

> "As used throughout this regulation, negotiation means that method of procurement under which the procedures for procurement by formal advertising * * * are not required".

Thereafter, in the same Section it is provided that the Contracting Officer must get statements and analyses of estimated costs and other vital matters when a contracting officer elects to use the negotiation method of procurement. Then the same Section provides:

> "Negotiations shall thereupon be conducted, by Contracting Officers and their negotiators, with due attention being given to the following and any other appropriate factors:
>
> * * * * * *

"(g) Individual bargaining, by mail or by conference;" (Appendix to this Petition, page 12a)

The Government did not require petitioner nor any other proposer on this project to put up a bid bond. If it had done so, petitioner would have been put on notice that its bid was final as where the Government uses the advertising-for-bids method.

3. The decision below gives the word "negotiation" a meaning contrary to what Congress understood it to have when it enacted the Armed Services Procurement Act of 1947.

Prior to the enactment of that Act government departments made representations to Congress as to what they had been doing when conducting "negotiations" and left Congress with the understanding that the same practice would prevail after the Act would be passed. (Appendix to this Petition, page 28a). It was stated to Congress in these representations that:

> "Procurement by negotiation as practiced by the services and industry consists of first securing informal quotations from as many sources as practicable, usually accompanied by breakdowns of elements of cost. Separate negotiations then usually begin with the lower bidders, in order to reduce the price by eliminating unnecessary or unjustified charges. When the best possible agreement has been reached, an appropriate contract is awarded the successful firm. Experience has shown that by careful negotiation and by drafting a suitable contract it is frequently possible to secure substantial savings for the Government. Negotiation, properly employed, can promote and intensify competition." (Appendix to this Petition, page 28a).

The foregoing representations and description of procurement practice made to the Congress prior to the enactment of the Armed Services Procurement Act of 1947, are set forth in a Report dated December 5, 1956 of the Subcommittee on Special Investigations of the Committee on Armed Services of the House of Representatives. (Appendix to this Petition, pages 15a-33a). The report was made after hearings had been conducted in connection with a Navy procurement practice. The Navy had issued a directive notifying proposers that when its negotiator was satisfied with the lowest proposal submitted the award would be made without further negotiation. (Appendix to this petition, page 16a) In its Request for Proposals the Navy further cautioned each proposer to submit its best offer since there might not be an opportunity accorded the proposer to revise its proposal. (Appendix to this petition, page 20a).

The subcommittee condemned this Navy practice stating:

> "Thus, in the subcommittee's view, there is a serious legal question as to whether or not the procurement method prescribed by this Navy directive is in fact a 'negotiation' as defined in the statute. Until such time as there is a definitive ruling, it seems to the subcommittee that the Department is proceeding upon very tenuous grounds." (Appendix to this petition, page 27a).
>
> * * * * * * *
>
> "We think this directive is not only unlawful but that it is an evasion of the statute. We think the procedure is unauthorized. We think it is unfair both to the Government and to the prospective bidders. More than that, we think it is arbitrary and a potential source of mischief and abuse. * * *" (Appendix to this petition, page 32a).
>
> * * * * * * *

"The departments have long argued for greater flexibility in the forming of contracts and have been given latitude for discussions in bargaining. Yet this regulation is just the opposite of bargaining. It removes all of the flexibility which is sought because it denies the opportunity for discussion. It deceives bidders no matter how artfully phrased.

"This regulation introduces an inflexibility which is the direct opposite of negotiation in the common usage of that term, in the statutory construction thereof and in the understanding of congressional intent as to the negotiations practiced by the departments and allowed by law in 17 specific instances." (Appendix to this petition, page 33a). * * *

A comparison of the Navy directive and the caution set forth in its Request with the Army Regulations and the language in its Request suggests that the condemnation of the Navy practice by the subcommittee would apply with greater force to the facts in the instant case.

4. The Comptroller General's decision would prohibit any government officer from paying petitioner for the job. In the Appendix to this petition, pages 34a-42a, appears the decision of the Comptroller General of the United States dated February 12, 1952, which is reported in 31 Opinions, Comp. Gen. 378. Petitioner submits that this Court can take judicial notice of the following facts:

a. That the question whether a contract was made by the parties to the instant case and covering the job in question was submitted to the Comptroller General by the Secretary of the Army, the contracting officer's superior. (Appendix to this petition, page 34a).

b. That the documents submitted to the Comptroller General by the Secretary of the Army included the same documents relied upon by respondent to establish the contract, that is to say, the Request for Proposals, (Appendix to this petition, page 34a); the Contractor's Proposal, (Appendix to this petition page 34a); and the Notice of Award and Notice to Proceed, (Appendix to this petition page 35a).

c. That the Comptroller General decided that no contract was made and that petitioner incurred no liability under its Contractor's Proposal. (Appendix to this Petition, page 41a).

Applicable statutes appear in the Appendix to this petition, pages 10a-11a. In sum they provide: All claims and demands by or against the government shall be settled and adjusted in the General Accounting Office. (31 USC 71) (Appendix to this petition, page 10a). Balances certified by the General Accounting Office upon the settlement of public accounts shall be final and conclusive upon the Executive branch (31 USC 74) (Appendix to this petition, page 10a); and the head of any executive department may apply for and the Comptroller General shall render his decision upon any question involving a payment to be made by said head or under him, which decision shall govern the General Accounting Office in passing upon the account containing said disbursement (31 USC 74) (Appendix to this Petition, pages 10a-11a).

In the Federal Bar Journal, October-December 1954, page 321, is an article "The General Accounting Office and Government Procurement" by J. Edward Welch, Assistant General Counsel, GAO. (Appendix to this petition page 42a) He states that as a protection against adverse action in the post audit, heads of gov-

ernment agencies may apply to the Comptroller General for a decision on any question involving a payment "to be made by them" (page 322). In order to minimize delay in making award of government contracts, contracting officers could submit directly to the Comptroller General for advance decision questions involving mistakes in bids. (*Id.*).

It is submitted that regardless of the correctness or incorrectness of the Comptroller General's decision, no disbursing officer of the Army would make a payment, nor would the Secretary of the Army approve a payment, for work done on the basis of a contract attempted to be established by the documents referred to. Hence the government, which foreclosed itself from paying petitioner for the job, should not collect damages because petitioner did not proceed with the work.

5. The decision below should be reviewed because it stands as a controlling precedent for future negotiated procurement and cannot be raised again after remand for trial as the record on any future appeal would be entirely different. The questions presented in this case are of great and recurring significance in connection with all government procurement pursuant to the Armed Services Procurement Act of 1947 as amended, by the method known as "negotiation".

CONCLUSION

For the reasons above set forth, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

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